LIBRARY
SUPREME COURT, U.S.

FILED
SEP 11 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1952.
No. 205.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA ELECTRIC POWER COMPANY,

Respondents.

BRIEF OF CALIFORNIA ELECTRIC POWER COMPANY IN OPPOSITION TO THE WRIT.

HENRY W. COIL,
DONALD J. CARMAN,
3845 Market Street,
Riverside, California,
Attorneys for California Electric Power Company.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Statement of facts 1

I.

The petition herein displays no actionable injury to petitioner by either the California Public Utilities Commission or by the California Supreme Court 3

II.

The sale by Company to Navy is not a sale in interstate commerce 4

III.

Neither the Attorney General nor the Solicitor General has any authority to represent the Government for the purpose of surrendering the Navy's contracting autonomy to Federal Power Commission 7

IV.

Company's sale to Navy is not a sale at wholesale, that is, "to any person for resale" and hence is not subject to the jurisdiction of Federal Power Commission 8

V.

Under the facts of this case, Company's rates are subject to regulation by a State Commission or State Commissions under Sections 19 and 20 of the Act 14

TABLE OF AUTHORITIES CITED

Cases	Page
Alabama Power Co. v. Fed. Power Com., 128 F. 2d 280	16
Attleboro, In re, 373 U. S. 83	12, 13
Camfield v. United States, 167 U. S. 518	15
Connecticut L. & P. Co. v. Fed. Power Com., 324 U. S. 515	12
Federal Power Com. v. Panhandle Eastern Pipe Line Co., 337 U. S. 498	12
Georgia Power Co. v. T. V. A., 14 Fed. Supp. 673	5
Light v. United States, 220 U. S. 523	15
Niagara Falls Power Co., In re, 137 F. 2d 787	16
Pacific P. & L. Co. v. Fed. Power Com., 184 F. 2d 272	12
Panhandle Eastern Pipe Line Co. v. Fed. Power Com., 341 U. S. 329	12
Panhandle Eastern Pipe Line Co. v. Pub. Serv. Com., 332 U. S. 507	12
Pennsylvania Water & Power Co., In re, 343 U. S. 414	15, 16, 17
Safe Harbor Water Power Co. v. Fed. Power Com., 124 F. 2d 800	16
Safe Harbor Water Power Co. v. Fed. Power Com., 179 F. 2d 179	15, 16, 17
Trade Mark Cases, 100 U. S. 82	5
United States v. Cooper Corp., 312 U. S. 600	6
United States v. United Mine Workers, 330 U. S. 258	6
United States v. Wittek, 337 U. S. 346	6
United States ex rel. Chapman v. Fed. Power Com., 191 F. 2d 796	8
Wabash Co. v. Illinois, 118 U. S. 557	5
Wisconsin-Michigan Power Co. v. Fed. Power Com., 197 F. 2d 472	11

STATUTES

	PAGE
Federal Power Act, 49 Stat. 863; 16 U. S. C. 791	1
Federal Power Act, Sec. 3(3), (4), (7)	8
Federal Power Act, Sec. 19	14
Federal Power Act, Sec. 20	14, 15, 17
Federal Power Act, Sec. 201(a)	14
Federal Power Act, Sec. 201(b)	8
Federal Power Act, Sec. 201(c)	6
Federal Power Act, Sec. 201(d)	8, 11, 13
Federal Power Act, Sec. 201(f)	6, 13
Federal Power Act, Sec. 205	7
Federal Power Act, Sec. 206	7
United States Constitution, Art. I, Sec. 8	4
United States Constitution, Art. IV, Sec. 3	15

APPENDIX C

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11224

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 11225

WISCONSIN POWER AND LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Decided November 13, 1952

Before CLARK, PROCTOR AND WASHINGTON, Circuit Judges:

WASHINGTON, *Circuit Judge:* On July 12, 1951, the Federal Power Commission ordered the Wisconsin Power and Light Company to file rate

IN THE

Supreme Court of the United States

October Term, 1952.
No. 205.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA ELECTRIC POWER COMPANY,

BRIEF OF CALIFORNIA ELECTRIC POWER COMPANY IN OPPOSITION TO THE WRIT.

Statement of Facts.

California Electric Power Company (Company) is a public utility electrical corporation generating, transmitting and distributing electric energy in the State of California and also a public utility engaged in the transmission and distribution of electric energy in Nye and Esmeralda Counties, Nevada, which latter business and the lines used therefor are distinct from the delivery of electric energy to the United States Navy (Navy) in California for the use of Hawthorne Ammunition Depot at Hawthorne, Mineral County, Nevada.

Company is a licensee under Part I of Federal Act (Act)[1] holding licenses for seven hydro electric power plants in Mono and Inyo Counties, California. At one of

[1] 49 Stat. 863; 16 U. S. C. 791, *et seq.*

schedules for the Company's electric service to four municipalities in southwestern Wisconsin. The Company petitioned this court under section 313 (b) of the Federal Power Act, 16 U. S. C. § 825*l* (b), to review and set aside the Commission's order of July 12, as well as another issued by it on August 27, 1951, denying the Company's application for a rehearing. A like petition was filed by the State of Wisconsin and the Public Service Commission of Wisconsin. Proceedings on these petitions were consolidated by order of this court.

We think the petitioners' principal contentions are disposed of by the able opinion of the Seventh Circuit in *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (7th Cir. 1952), a case which arose upon strikingly similar facts. There, as here, the issue was whether the Commission had jurisdiction, pursuant to section 205 of the Federal Power Act, 16 U. S. C. § 824d, over the rates charged certain municipalities. In each case the petitioning company sold to the municipalities a supply of electric energy, some of which originated out of state, for resale by them to their residents. In each it was urged, on similar grounds, that this business was not covered by section 205. It is our view, as it was the Seventh Circuit's in the *Wisconsin-Michigan* case, (1) that these are sales at wholesale[1] within the meaning of the definition contained in section 201 (d); (2) that

[1] The Commission made no finding that these sales were "national in character." The Company urges that such a finding was necessary. We disagree. Where interstate transmission is involved; the controlling distinction is be-

the section 201 (b) exemption from Commission jurisdiction of "facilities used in local distribution" is inapplicable here, and the Company therefore is a public utility within the meaning of the definition in section 201 (e); and (3) that a history of previously unchallenged regulation by the State does not oust the Commission of jurisdiction. The reasoning given by Judge Lindley in support of his conclusions develops the views expressed by this court in *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, 89 U. S. App. D. C. 235, 193 F. 2d 230, 239–41 (1951), aff'd 343 U. S. 414 (1952). See also *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679 (9th Cir. 1952); *California Electric Power Co.* v. *Federal Power Commission, et al.*, — F. 2d — (9th Cir., Oct. 14, 1952). Under the circumstances, we think it would serve no useful purpose to endeavor to supplement

---

tween wholesale and retail sales. See *Panhandle Co.* v. *Michigan Commission*, 341 U. S. 329, 334 (1951); *Panhandle Pipe Line Co.* v. *Commission*, 332 U. S. 507, 517 (1947); *Colorado-Wyoming Co.* v. *Commission*, 324 U. S. 626, 630 (1945). In none of the cases just cited was a finding made, or deemed necessary, that the sales in question were national rather than local in character. And the fact "that the amount of out-of-state energy is small in proportion to the total amount of energy sold is unimportant." *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 at 478. Nor does "wholesale" mean a large quantity: *Panhandle Pipe Line Co.* v. *Commission*, *supra*, 332 U. S. 507 at 515n. In the instant case, the Commission found, among other things, that "It is necessary and appropriate for the purposes of the Federal Power Act * * *" that the Commission order the Company to file a schedule of rates for the sales in question. (R 1205)

Judge Lindley's discussion of the governing legal principles.

A procedural point urged by the petitioner Company requires consideration, however. It contends that the Commission entered the order of July 12, 1951, without according the Company due process of law. The basis of its contention is that it did not acquire the distribution facilities here involved until after the close of the Commission's hearings; that it "has had no opportunity since it became the owner of the * * * property, to be heard with reference to its operation of said property," and that the Commission therefore was not justified in finding it to be a "public utility," subject to the filing requirements of the Act.

The sequence of events underlying this contention is as follows: When the hearing before the Federal Power Commission Examiner closed on June 9, 1950, the Company was not yet the owner of the facilities in question. But it had previously made application to the Commission for authorization (under section 203 of the Federal Power Act) to acquire them (R. 704–808). As a result of this application it had been designated by the Commission as an additional respondent in the original proceeding, and ordered to show cause why it should not file rate schedules "if, when, and as the acquisition * * * is approved and authorized" (R. 1047). The Company did not appear at the hearing or offer evidence. In its return to the show-cause order it simply denied that the Commission had any jurisdiction to require it to file schedules. The acquisition was approved by order of the Commission on June 21, 1950. The

Company actually took over the facilities on June 30, 1950, a fact of which it notified the Commission by formal report on July 31. The Examiner took notice of this fact in his decision, announced on March 14, 1951. He found that "there is at least a presumption that the existing method of operation [i. e., securing the electricity sold from out-of-state] * * * will be continued * * * ," and ordered the Company to file rate schedules for its service to the municipalities. The Company filed exceptions to this decision, as will more fully appear, but did not except to the taking of notice. The Commission's decision was filed on July 12, 1951. It also took "official notice" of the Company's report of the completion of the acquisition, "pursuant to" its approval order of June 21, which it interpreted as requiring that energy for the municipalities continue to come from the out-of-state source during the next two years. On that basis, it confirmed the filing requirement.

The Company now complains of this taking of notice and of alleged misinterpretation by the Commission of the terms on which it approved the acquisition. Its theory is that these actions were essential to the finding that it is a "public utility," and hence that this finding, essential to Commission jurisdiction, is unjustifiable. The Company further urges that it should have been heard upon the allegations of its petition for rehearing. These were to the effect that, "pursuant to a predetermined plan to supply the four municipalities" with Wisconsin energy, three of them had received no out-of-state energy since twelve days after the transfer of ownership, except in emer-

gencies.[2] The Company appears to contend that these allegations, if true, required that the Commission withdraw or modify its order of July 12, 1951.

We think the Company's arguments quite untenable. In the first place, there are many occasions—and this would seem to be one of them—on which a regulatory agency can and should take official notice of the reports filed with it by a regulated company. See *Market Street R. Co. v. Railroad Commission*, 324 U. S. 548, 562 (1945); cf. Administrative Procedure Act § 7 (d), 5 U. S. C. § 1006 (d). Secondly, the objection—if any—to the taking of official notice by the Examiner was waived by failure to file appropriate exception under the Commission's rules;[3] the Company thereafter could not complain if the Commission likewise took official notice. Thirdly, the Commission's finding in its order of July 12, 1951—that the Company is subject to the filing requirements—is amply justified without need to rely on official notice of the report of July 31, 1950. In its exceptions to the Examiner's decision in the spring of 1951 the Company repre-

[2] As to the fourth municipality, the Company alleges in its petition to this court that that town too is now served by power from Wisconsin sources. But that fact—if it be a fact—cannot under the circumstances be raised for the first time in this court. See Section 313 (b) of the Federal Power Act, 16 U. S. C. § 825*l* (b).

[3] Section 1.31 (c) of the Commission's General Rules and Regulations provides that "Failure to file exceptions within the time allowed under this section shall constitute a waiver of all objections to the intermediate decision served * * * and any matter not included in such exceptions shall be deemed waived."

sented to the Commission that it was operating the facilities in question in the same way its predecessor had. At that time the Company affirmatively stated that the power then being sold to the municipalities was coming in part from Illinois and that title passed to the Company at the state line (R. 1141, 1142, 1145). And it requested the Commission to make findings to that effect (R. 1150–51). Such findings were included in the Commission order of July 12, 1951. Fourthly, these representations also dispose of the Company's contentions with respect to misinterpretation of the terms of the acquisition: the misconstruction, if any, was harmless, since it was not the only basis for concluding that interstate sales were being made.

Nor did the Commission abuse its discretion when it denied the petition for rehearing. If the actual facts are as there set forth, i. e., that three of the towns had for some time been connected to Wisconsin power sources, the Company should have given the Commission prompt notice of the change. Instead, it delayed for more than a year in doing so, and in the interval made contrary representations to the Commission. Orderly dispatch of administrative business—as of judicial business—demands that parties give timely notice of changed positions or changed facts. If they do not, they must take the consequences. See *Missouri Pacific Ry. Co.* v. *Castle*, 224 U. S. 541, 546 (1912). Under the circumstances, we think the Commission acted within its powers.

The orders of the Commission will accordingly be

Affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1952

The question is: Does Federal Power Commission have any authority to supersede the contracting power of the Navy and can it in any way be aided in assuming that power by representations of the Attorney General or the Solicitor General?

There is no such authority. Certainly the very general definition of interstate commerce found in Federal Power Act, accompanied by the declaration that none of the provisions of Part II apply to the Navy does not afford it.

IV.

Company's Sale to Navy Is Not a Sale at Wholesale, That Is "to Any Person for Resale" and Hence Is Not Subject to the Jurisdiction of Federal Power Commission.

It is admitted by Petitioner that Company's sale to Navy is not subject to Federal Power Commission's jurisdiction unless it is a sale at wholesale, that is, "for resale."[5]

It is also admitted that, under the literal terms of the Act,[6] the Navy is not a person, and sale to Navy is not a sale of electric energy "to any person," so as to come under Federal Power Commission jurisdiction.

It has been contended by Federal Power Commission that, generally throughout the Act, the term "person," does not include the United States, its departments or agencies. In a brief filed by F.P.C. in August, 1951, in the United States Court of Appeals for the 4th Circuit in Nos. 6273 and 6274, *United States ex rel. Chapman v. Federal Power Com. and Virginia E. & P. Co.* (later decided 191 F. 2d

---

[5]Act, Section 201(b) and (d).

[6]Section 3(3), (4), (7); Section 201(d).

796, Cert. granted 72 S. Ct. 1034), this point was demonstrated in language so convincing that we quote and adopt it as our own.

"'Person' is limited in Sec. 3(4) to mean 'an individual or a corporation.' This alternative definition excludes the United States. For the United States is clearly neither a corporation nor an individual.

"Usage of the word 'person' elsewhere in the Act confirms this definition. As used throughout the Act the word 'person' cannot include the United States. If it did, absurd or impossible situations would arise; the licensing provisions of the Act would apply to the Army Engineers, Bureau of Reclamation, T.V.A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and service in interstate commerce would apply to the Secretary of the Interior, T.V.A. and other Federal agencies; and the Commission could sue to enjoin the United States under Sec. 314(a), ask for the issuance of writs of mandamus against the United States under Sec. 314(b), and request penalty fines against the United States under Sec. 316.

"Furthermore, there would then be no reason for having included Sec. 303 in the Act in order to make 'agencies of the United States' engaged in the sale of power subject to the provisions of Sections 301 and 302, so far as may be practicable. For those latter sections by their terms apply to every 'licensee,' and the agencies of the United States would be 'persons' requiring a license under Sec. 23(b)—'licensees.'

"Finally, it is significant that Sec. 3(13), in describing excluded donations, list of funds obtained from 'States, municipalities, individuals, *or others.*' The word 'others' has been interpreted by the Commission to include the United States, the word being

looked upon as a catch-all. No word which could be considered a catch-all was used in Sec. 313(a) though Congress, as Sec. 3(13) shows, could have used such a word had it desired to do so.

"In the course of its passage through Congress, Sec. 313, which originally was drafted to give 'any person' the right to rehearing and review, was amended by adding 'State, municipality or State Commission.' This change made plain congressional recognition and intention that 'person' should not include governments, and that only State and municipal governmental units should be accorded rehearing and review.

"Sec. 313 as enacted was derived from S. 1725, 74th Cong. 1st Sess. The May 4, 1935, Confidential Print of S. 1725 shows, by underscoring the words italicized below, the additional language added in the Senate Committee:

"Sec. 309(a). Any person, *State, municipality or State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, *State, municipality or State Commission* is a party may apply for a rehearing within thirty days after the issuance of such order * * *.

"From this action, it is abundantly clear that the Committee considered that 'person,' as used in the bill, bore a restricted meaning. And to give the precise coverage in the section which they desired, they added the words 'State, municipality or State commission' to 'person.' If the Committee had thought that 'person' included the United States, there would have been no necessity for making the change. For if 'person' then included the United States, it necessarily included also the lesser governmental units, States, municipalities and State commissions.

"Further, it is clear that when the Committee added 'State, municipality or State commission' they gave the right to ask for a rehearing only to those governmental units which they considered should have that right. If the Committee members had desired that the United States have such a right, it would have been a simple matter for them to have included the United States. This the Committee did not do."

Petitioner argues, however (Pet. pp. 13-18), that this Court should strike out and ignore the words, "to any person," as they occur in Section 201(d) of the Act, because they were inserted by amendment as the Bill passed through Congress and no mention of the critical words was made in the Committee reports. This seems to be carrying legislative history beyond the limit of tolerance.

The provisions referred to are not ambiguous or uncertain, but are clear, specific, and capable of enforcement. There is no occasion to resort to legislative history.

Petitioner's contention virtually announces a general rule that, *where a bill is amended in its legislative course, no critical words inserted by the amendment will be given effect by the Courts unless the amendment is accompanied by a Committee report expressly mentioning an intent to insert such critical words.*

The point made by Petitioner is obviously one which should be addressed only to Congress.

The decision in *Wisconsin-Michigan Power Co. v. Fed. Power Com.*, 197 F. 2d 472 (C. A. 7), *loc. cit.* 479, relied upon by Petitioner, is not persuasive. That Court seems to have assumed too much, viz., that "the apparent inconsistency was an oversight," and that the "'slip' was inadvertent." Moreover, in placing its decision on "the con-

tinued construction of the Act by the Commission," that Court was directly in conflict with the District of Columbia Circuit in *Pacific P. & L. Co. v. Fed. Power Com.*, 184 F. 2d 272, holding that twenty years of administrative construction by the issuance of numerous licenses for minor lines under the claim of jurisdiction to do so did not alter the statute, though the meaning of the statute was, to say the least, debatable.

Petitioner argues further that this Court should disregard the words "to any person," because to give them effect would be unreasonable in that it would deny to the government the benefit of one phase of federal regulation. But this is a mere conclusion of the pleader, and defeats itself, since it is admitted that Congress did deny to the government some degree of federal regulation. For it is admitted that, except for the alleged "resale" of energy to its employees, and assuming that such is only a part of the operation of the Depot, Navy would not, under the Act, be entitled to any protection from federal regulation. This is so, because rates for energy sold in interstate commerce for consumption by the purchaser are not subject to Federal Power Commission jurisdiction.[7]

The argument that *Attleboro*, 273 U. S. 83 exposed the gap in regulation as to wholesale sales to both public utilities and non-public utilities and, hence, the Act was intended to close the gap as to one as well as to the other, fails to convince. There are three possible gaps: (1) sales

---

[7] *Fed. Power Com. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502; *Panhandle Eastern Pipe Line Co. v. Public Serv. Com.*, 332 U. S. 507; *Panhandle Eastern Pipe Line Co. v. Fed. Power Com.*, 341 U. S. 329; *Connecticut L. & P. Co. v. Fed. Power Com.*, 324 U. S. 515, 529.

to public utilities for resale; (2) sales to governmental agencies for resale, and (3) sales to any one for consumption. The act did not close the gap as to (3), why must it have closed the gap as to (2)? Actually, Section 201 (a), (b) and (d) closes only the gap exposed in *Attleboro*, that is, (1) above, or sale in interstate commerce to a privately owned utility for resale. The inclusion of anything more rests entirely upon the wish or desire of the Petitioner or Federal Power Commission, and cannot be read into the Act by an impartial examination.

The intent of Congress to exclude sales to the United States Navy and other departments and agencies of the United States through the definition of the word "person," in Section 201(d) is clear, for it conforms to the same intent manifested in the exclusion of those agencies in Section 201(f), and both results comport with the undoubted intent of Congress not to transfer to Federal Power Commission the contracting autonomy of all such agencies as the Navy, Army, Air Force, Tennessee Valley Authority, Reclamation Bureau, and Bonneville Power Authority.

The last named three are avowedly engaged in the sale and distribution of electric energy on a large scale, and it is utterly impossible to believe that Congress intended that, when any of them should purchase, from an interstate utility, energy for resale, the rate should be fixed by Federal Power Commission instead of those otherwise autonomous agencies.

The jurisdiction of Federal Power Commission rests upon express delegation by Congress. The authority of the Navy Department likewise rests upon express delegation by Congress. The powers of neither one nor the other can be broadened or narrowed by consent, request, or agreement between them.

V.

Under the Facts of This Case, Company's Rates Are Subject to Regulation Solely by a State Commission or State Commissions Under Sections 19 and 20 of the Act.

Sections 19 and 20 provide for the regulation of all of a licensee's rates, not merely those for the sale of power from licensed projects. Section 19 provides that every licensee which is a public service corporation (some are not) shall be subject to regulation by the State where the service is rendered or the rate charged, in this case, California. Section 20 provides that, if such power or any part thereof enters into interstate commerce, and if any of the states directly concerned has not provided a Commission to regulate the rates or such Commissions are unable to agree, then, jurisdiction is conferred on Federal Power Commission.

Under those provisions, it is immaterial whether or not interstate commerce be involved, for in neither event does Federal Power Commission have jurisdiction, there being no evidence in this case that any state commissions are unable to agree.

Since, under the facts of this case, regulation by a state or states has been provided for, Federal Power Commission has no jurisdiction under Part II of the Act, it being provided in Section 201(a) that federal regulation under that part is "to extend only to those matters which are not subject to regulation by the States."

It will be observed that, as applied to various conditions, Sections 19 and 20 provide for some regulation of interstate commerce by States and for some regulation of intrastate commerce by federal agency. The explanation of

what ordinarily would not conform to the powers of Congress under the Commerce clause lies in the fact that Part I of the Act was not enacted primarily under the commerce clause, but under Section 3 of Article IV of the Constitution, giving Congress power "to dispose of, and to make all needful rules and regulations respecting the territory and other property of the United States."

The Company's licenses are 50-year contracts in the nature of leases of public lands, founded on mutual benefits and detriments to the parties. In making such disposition of the property of the United States, Congress can attach any condition it wishes[8] unrestricted by the Commerce Clause as to distinctions between intrastate and interstate commerce. As a term of the lease, it could have made all commerce resulting from the operation of the projects, both intrastate and interstate, subject to state regulation, or all subject to federal regulation, or it could provide, as it in fact did provide, that, in the first instance, all rates should be subject to State regulation, which, under certain conditions, should give way to federal regulation.

Pennsylvania Water & Power Co., 343 U. S. 414, and *Safe Harbor Water Power Co.*, 179 F. 2d 179 (C. A. 3), (Certiorari denied 339 U. S. 957), are not contrary to but confirmatory of these principles. In both cases, interstate commerce being indisputably involved, it was found that the State Commissions were unable to agree, thus, under the express provisions of Section 20 of the Act, transferring jurisdiction to Federal Power Commission.

We understand that a judicial decision is authoritative only for the law as applied to the facts of that case. There

---

[8]*Camfield v. United States*, 167 U. S. 518; *Light v. United States*, 220 U. S. 523.

these plants (Mill Creek), Company delivers energy to Navy and Navy transmits the same over its own transmission line to its Naval Ammunition Depot at Hawthorne, Mineral County, Nevada.

The only contract ever existing between Company and Navy for such service was that dated July 1, 1943, in which Company agreed to sell and Navy agreed to purchase electric energy "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada," during the fiscal year 1944, and thereafter until 60 days' notice of termination by either party to the other.

In accordance with the terms of the Contract, Company terminated the contract as of October 1, 1948, and thereafter asserted charges under its P-2 Schedule which had been approved by California Public Utilities Commission, applicable to like business throughout Company's California system.

All of the energy delivered to Navy is generated in Mono and Inyo Counties, California, and is strictly California intrastate energy unless the Navy's transmission into its Naval Ammunition Depot renders it interstate.

Varying amounts of such energy, averaging about 25% of that sold by Company to Navy at Mill Creek, California, is, after transmission by Navy to the Ammunition Depot, used for the service of employees and others living or doing business on the Depot premises, which use has always been construed by Company to be "for the use of Ammunition Depot," since these employees would not be there or be served otherwise than in connection with the operations of the Depot. Navy never claimed otherwise until this case arose. The rest of the energy sold by Company to Navy, averaging about 75%, is used for the operation of machinery and other mechanical purposes.

I.

The Petition Herein Displays No Actionable Injury to Petitioner by Either the California Public Utilities Commission or by the California Supreme Court.

In its decision, the California Commission declared [R. p. 12]:

> "* * * electric rates prescribed by our Commission are *not* the rates which a utility must charge an arm of the United States Government. The Commission in 1942 issued General Order No. 96, which provides in Section X-B, that an electric utility may furnish electric service 'at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments.'"

This is emphasized in the Order [R. p. 19] at the close of the Opinion where it is ordered that the Company is *authorized* to charge and collect the rates set forth in Schedule P-2, but as to another customer, Mineral County Power System, the Company was *authorized and directed* to collect the rates set forth in Schedule P-3.

Therefore, said decision and Order of the California Commission fixed only a ceiling on the rates which the Company might charge to Navy but permitted it to charge a lower rate or even to render service free. Hence, there was no injury to Navy and no burden on commerce and nothing for this Court to adjudicate.

Whether the California Commission had or had not jurisdiction is inconsequential, for the result is the same in either case. That Commission's decision left the Navy completely free to negotiate as low a rate as it could, and purported merely to bind the Company not to go above the

P-2 rate. Assuredly, that could not injure the Navy in any way, for if that maximum be removed, the the Navy would not be benefited.

II.

The Sale by Company to Navy Is Not a Sale in Interstate Commerce.

All of the electric energy involved herein is, so far as generation and transmission by Company are concerned, strictly California intrastate energy. It is delivered to Navy at Mill Creek, California, and does not become interstate energy unless the transmission by Navy from California into the Ammunition Depot in Mineral County, Nevada, makes it interstate commerce.

The Navy is a part of the defense and war establishment of the United States authorized by Clause 1 of Section 8 of Article I of the Constitution, giving Congress power "to provide for the common defense," and by Clause 13 of the same Section, giving Congress power specifically "to provide and maintain a Navy."

The idea that the United States or its armed forces in defending or preparing to defend the country are engaged in interstate commerce is novel and incongruous. It would mean that the Navy, in dispatching a battleship from New York to San Francisco would be engaged in interstate commerce. If it sent such battleship to Korea, presumably, it would be engaged in foreign commerce.

Congress does not create and maintain a Navy under its power to regulate interstate and foreign commerce but under the other constitutional powers above mentioned. The United States, in the exercise of its constitutional functions, operates in the country as a whole, entirely

obvious of state lines. The armed forces do not defend the country, state by state, but as an entire nation.

If that were not so, it could just as plausibly be said that the Judicial Department is engaged in interstate commerce, because this Court publishes its decision and sends them throughout the country or because the Justices of this Court or Judges of the lower courts cross state lines in the performance of their judicial duties.

As stated in *The Trade Mark* cases, 100 U. S. 82, "Commerce among the States means commerce between individual citizens of different states" And in *Wabash Co. v. Illinois*, 118 U. S. 557, "Interstate commerce is trading and trafficking in commodities between and amongst citizens of different states."

The Constitution nowhere gives the federal government power to engage in interstate commerce, nor has it ever been supposed that any was needed. Its delegated powers are nation wide; not from state to state. The power was given to regulate interstate commerce, not to engage in it.

So unusual is the idea that the United States in the conduct of its Constitutional functions is engaged in interstate commerce, that there is almost no authority directly on the proposition.

In *Georgia Power Co. v. T.V.A.*, 14 Fed. Supp. 673, it was suggested that T.V.A. was engaged in interstate commerce, but the District Court said:

> "There has been some argument that interstate transmission of electricity is interstate commerce, but its local distribution is domestic commerce, but I think the matter immaterial. The federal power over interstate commerce is to regulate it, not to engage in it. TVA gets no help from that source. Its activities in

> selling electric power as pointed out in Ashwander *et al*, v. Tennessee Valley Authority, 56 S. Ct. 466, 80 L. Ed. ..... rest on the constitutional right of the United States to dispose of their property."

Petitioner presumably claims that the Navy is engaged in interstate commerce because Section 201(c) of Federal Power Act provides:

> "For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States."

But Statutes are not deemed to include the United States unless expressly so indicated.[2]

Moreover, Section 201(f) of the Act provides:

> "No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority or instrumentality of any one or more of the foregoing * * *."

If the Navy is not constitutionally engaged in interstate or foreign commerce, but is merely carrying out a national constitutional function, its transactions cannot be made into interstate or foreign commerce by Act of Congress for the purpose of regulating those who sell commodities to the Navy for use in another state or in a foreign country. Congress may limit or forego some of its powers under the commerce clause (as it has done in Federal Power Act) but it cannot enlarge its powers of

---

[2] *United States v. Wittek*, 337 U. S. 346; *United States v. United Mine Workers*, 330 U. S. 258; *United States v. Cooper Corp.*, 312 U. S. 600.

regulation by defining as interstate or foreign commerce that which is not such under the Constitution.

When the Company delivers purely intrastate power to the Navy at Mill Creek, California, that energy becomes part of the defense establishment and nothing that the Navy does with it for defense purposes can be transformed into interstate or foreign commerce.

III.

Neither the Attorney General nor the Solicitor General Has Any Authority to Represent the Government for the Purpose of Surrendering the Navy's Contracting Autonomy to Federal Power Commission.

The Navy is a Constitutional Department of the government with complete power to contract for its supplies, subject only to appropriations or other limitations placed upon it by Act of Congress.

Federal Power Commission is an independent establishment, with authority, among other things, to fix rates for the sale of electric energy for resale in interstate commerce. It fixes the exact rate which is both maximum and minimum and in which no change can be made without its authority.[3]

The effect of the contentions of the Attorney General and of the Solicitor General[4] would be to surrender the contracting power of the Navy Department in relation to the electric energy involved in this case into the hands of Federal Power Commission.

---

[3]Sections 205 and 206 of the Act.

[4]The Acting Assistant Attorney General represented the government in the Supreme Court of California [R. p. 5]. The Solicitor General represents the Petitioner in this Court.

is nothing in either case explaining what would be the consequences in the absence of the critical finding that the State Commissions were unable to agree. There we would have power to regulate conferred on both state and federal commissions, precipitating an incongruous condition.

Neither of the two decisions last mentioned makes any disposition of this apparent conflict. In *Safe Harbor Water Power Co.* (*supra*), the Third Circuit definitely held that Part II did not repeal Sections 19 or 20 of Part I, and in *Pennsylvania Water & Power Co.* (*supra*), this Court did not discuss the point, except to say (72 S. Ct. pp. 845-846):

> "It may be possible that some future case will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one."

Evidently, this Court intended to limit its decision to the facts of that case and not to decide other facts by dictum.

In first *Safe Harbor*, 124 F. 2d 800 (C. A. 3), it was held that, where interstate wholesale rates of a licensee were involved and there was no evidence that the State Commissions wre unable to agree, Federal Power Commission had no jurisdiction. This seems to be supported by *Alabama Power Company*, 128 F. 2d 280, and *Niagara Falls Power Co.*, 137 F. 2d 787.

Following the decision in first *Safe Harbor*, a change in facts occurred in that Public Service Commission of

Maryland on August 30, 1944, addressed a letter to Federal Power Commission asking it to conduct an investigation of the interstate rates between Pennsylvania and Maryland, which letter formed the basis for the finding in both cases relied upon by Petition (*Second Safe Harbor* and *Pennsylvania W. & P. Co.*) that the two State Commissions were unable to agree, thereby vesting jurisdiction in Federal Power Commission under Section 20.

The writ should be denied.

Respectfully submitted,

HENRY W. COIL,
DONALD J. CARMAN,
Attorneys for California Electric Power Company.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of September, A. D. 1952.

9-9-52—80